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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 154.

THE CITY OF DAWSON, APPELLANT,

v.

THE COLUMBIA AVENUE SAVING FUND, SAFE DEPOSIT, TITLE AND TRUST COMPANY.

PETITION OF APPELLEE FOR REHEARING AND BRIEF IN SUPPORT THEREOF.

JOHN G. JOHNSON,
JOHN I. HALL,
OLIN J. WHEELER,
Counsel for Appellee.

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THE COLUMBIA AVENUE SAVING FUND, SAFE DEPOSIT, TITLE AND TRUST COMPANY.

PETITION FOR REHEARING.

The Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company, appellee in the above-entitled cause, prays for a rehearing on the following grounds:

I.

This court holds that the case at bar is governed by St. Paul Gaslight Co. *v.* St. Paul, 181 U. S., 142, 150, and not by Walla Walla *v.* Walla Walla Water Co., 172 U. S., 1. After pointing out that "undoubtedly the decisions on the two sides of the lines are very near to each other," the court draws the distinction between the case at bar and the Walla Walla case, and Vicksburg Waterworks Co. *v.* Vicksburg, 185 U. S., 65, in the following words:

"In the case before us there was no legislation subsequent to the contract, and it is not even shown that there is color of previous legislation for the city's acts."

Through failure of counsel for the appellee to point out clearly in the argument or the brief the Georgia statutes and decisions upon this point, the color of previous legislation for the city's acts was not brought to the attention of the court, as could have been done.

The charter of the city of Dawson (act of the General Assembly of Georgia, approved September 21, 1883, set out in the printed Record, pp. 220–226) provides:

"SEC. 6. *Be it further enacted*, That the said mayor and aldermen shall have power and authority from time to time, to make, ordain and establish such by-laws, ordinances, rules and regulations, as shall to them appear necessary and proper for the security, welfare, convenience and interests of said city of Dawson, and the inhabitants thereof, and for preserving the health, morals, peace, order and good government of the same, and not inconsistent with the constitution and laws of Georgia."

Under the uniform decisions of the Georgia courts this "general welfare clause" of the city's charter is legislation authorizing the city to provide a water supply for fire protection and for the domestic use of its inhabitants, either by contract with a water company or by itself building its own works by holding a bond election and issuing bonds to defray the cost of construction or purchase, as the city attempted to do in the present case.

In City of Dawson *v.* Dawson Waterworks Company, 106 Ga., 696, 709, the supreme court of Georgia say, with respect to the power of the City of Dawson under its aforesaid charter:

"That a municipal corporation may exercise the power of taxation for the purpose of providing its inhabitants with water for domestic use, as well as to provide the city with water to protect the inhabitants from fire, is the settled law of this State and is not questioned in the present case. (Citing) Frederick *v.* Augusta, 5 Ga., 569; Rome *v.* Cabot, 28 Ga., 50; Wells *v.* Atlanta, 43 Ga., 67. A supply of water for these purposes may be procured by a municipal corporation

either by building itself the works necessary for the purpose, or by making a contract with other persons to supply the same" (p. 709 of opinion, 106 Ga.).

And in Heilbron *et al. v.* The Mayor and Council of Cuthbert, 96 Ga., 312, the supreme court held that under the general welfare clause of its charter a city has authority, upon complying with the requisite constitutional and statutory provisions (as was done by the city of Dawson in the case at bar), to issue bonds for the construction and maintenance of water works.

The city of Cuthbert, under a general welfare clause similar to that in the charter of Dawson (though somewhat less full), proceeded to hold a bond election to build its own water works under the same statutory and constitutional provisions which the city of Dawson acted under in the case at bar. Both cities took the same action, the only difference being that in the case of Cuthbert there existed no contract with a water company the obligation of which was impaired, and it was in that case held that there was legislation which not only was color for but fully authorized the city's acts.

We think, therefore, it is shown that there was color of previous legislation for the city's acts, and that the case at bar, therefore, falls squarely within the principal rules in Walla Walla *v.* Walla Walla Water Co., 172 U. S., 1.

II.

We think, too, because of the failure of counsel to bring to the attention of the court the extent of the power given the city of Dawson by the legislature, the court is incorrect in the conclusion that in the case at bar there was no legislation subsequent to the contract.

We think that, in view of the provisions contained in the statutes and clauses of the State constitution under which the city acted (and to which, unfortunately, counsel for appel-

lee failed to direct the court's attention), the city's acts authorized by the statutes which were thereby called into operation constituted legislation subsequent to the contract and in impairment of its obligation. That the ordinance of the city of Dawson calling for an election for the purpose of determining whether the city should incur a bonded debt for the purpose of building or purchasing a system of water works to be owned by the city, the election held under such ordinance, the ordinance declaring the result of the election to be in favor of incurring the bonded indebtedness, and the city's acts and its admitted purpose of carrying the ordinance into effect by issuing the bonds and constructing water works constitute legislation will, we believe, be clear when the provisions of the Georgia constitution and statutes are looked into.

Paragraphs 1 and 2, section 7, article 7, of the State constitution are as follows:

ARTICLE 7, SECTION 7, PARAGRAPH 1. "*Debt of Counties and Cities Not to Exceed Seven per cent.*—The debt hereafter incurred by any county, municipal corporation, or political division of this State, except as in this constitution provided for, shall not exceed seven per centum of the assessed value of all the taxable property therein, and no such county, municipality or division shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum of the assessed value of taxable property therein, without the assent of two-thirds of the qualified voters thereof, at an election for that purpose to be held as may be prescribed by law; but any city, the debt of which does not exceed seven per centum of the assessed value of the taxable property at the time of the adoption of this constitution, may be authorized by law to increase at any time the amount of said debt three per centum upon such assessed valuation."

"PAR. 2. *County and City Bonds, How Paid.*—Any county, municipal corporation, or political division of this State, which shall incur any bonded indebtedness under the provisions of this constitution shall, at or before the time of so doing, provide for the assessment and collection of an annual

tax, sufficient in amount to pay the principal and interest of said debt within thirty years from the date of the incurring of said indebtedness."

Civil Code of Georgia (ed. 1895), §§ 5893, 5894 (vol. 2).

And article 7, section 10, paragraph 1, of the constitution is as follows:

ARTICLE 7, SECTION 10, PARAGRAPH 1. "*City Debts, How Incurred.*—Municipal corporations shall not incur any debt until provision therefor shall have been made by the municipal government."

Civil Code, § 5897 (vol. 2).

Section 377 of the Code of Georgia (vol. 1, page 123), being the same section cited in Heilbron *v.* The Mayor, etc., of Cuthbert as section 508*i* of older code, is as follows:

"377 (508*i*). *Notice of Election on Issue of Bonds.*—When any county, municipality or division shall desire to incur any bonded debt, as prescribed in paragraphs 1 and 2, section 7, article 7, of the constitution of 1877, the election required shall be called and held as follows, to wit: The officers charged with levying taxes, contracting debts, etc., for the county, municipality or division, shall give notice for the space of thirty days next preceding the day of election, in the newspaper in which the sheriff's advertisements for the county are published, notifying the qualified voters that on the day named an election will be held to determine the question whether bonds shall be issued by the county, municipality or division. In said notice he shall specify what amount of bonds are to be issued, for what purpose, what interest they are to bear, how much principal and interest to be paid annually, and when to be fully paid off."

The city therefore, in doing the acts complained of, was necessarily in the exercise of its powers of taxation. It could incur no debt without providing for the payment thereof by taxation. The voters in authorizing the debt were authorizing the tax. The one cannot be separated from the other. All matters relating to taxation, all matters relating

to the raising of public revenues and authorizing the expenditure of public moneys, are necessarily legislative in their character.

In *Heilbron v. Mayor and Council of Cuthbert*, 96 Ga., 312, *supra*, and *City of Dawson v. Dawson Waterworks Co.*, 106 Ga., 696, 709, *supra*, it is held that the city, upon complying with the above-quoted constitutional and statutory provisions, may exercise the power of taxation for the purpose of providing water for fire protection and the domestic use of its inhabitants.

Taxation, "whether exercised by the legislature itself or delegated by it to a municipal corporation, is strictly a legislative power" (125 U. S., 18, 31, N. O. Waterworks Co. *v.* Louisiana Sugar Refining Co., and cases cited).

That an ordinance "whereby the mayor was instructed to notify the water-works company that the mayor and aldermen deny any liability upon any contract for the use of the water-works hydrants and the subsequent action of the city in holding an election to authorize the issue of bonds to buy or construct water works of its own and in refusing to pay the amount due and payable under the terms of the ordinance do not present the mere case of a breach of a private contract to be remedied by an action at law, but disclose an intention and attempt by subsequent legislation of the city to deprive the complainant of its rights under an existing contract" (pp. 81, 82 of opinion in the Vicksburg case, 185 U. S.), is what we understand to be the distinct and express ruling of this court in *Vicksburg Water Works Co. v. Vicksburg*, *supra*, and such are precisely the averments and the proof in the case at bar.

That an ordinance whereby the city sought to build water works of its own, under color of legislation preceding the contract, and for such purpose called an election to authorize the issue of bonds to raise the necessary money, constitutes legislation, is what we understand to be the ruling in *Walla Walla v. Walla Walla Water Co.*, *supra*.

We think, therefore, that in the case at bar there was legislation subsequent to the contract, and that the case is governed by *Walla Walla v. Walla Walla Water Co.*, 172 U. S., 1, and *Vicksburg Water Co. v. Vicksburg*, 185 U. S., 65, and not by St. Paul Gaslight *v.* St. Paul, 181 U. S., 142.

This we have undertaken to point out with somewhat more fullness in the accompanying brief.

III.

This court in the opinion say:

"The bill presents a naked case of breach of contract. The first step of the city was to repudiate the contract and to refuse to pay. Whatever it may have done subsequently, its wrong, if, contrary to the decision of the supreme court of the State, there was a wrong, was complete then. The repudiation and refusal were kept up until the bill was filed and the other acts were subsequent, subordinate to and in aid of them."

We think that in this also the lack of a proper presentation to the court of the facts on this point has allowed the court to form a mistaken conclusion.

It appears that the ordinance of June 27, 1894, repudiating the contract was passed for the purpose of invoking a decision of the State court that the city had the right to build its own water works or purchase, if the water works company would sell at a ruinous sacrifice. We think it clearly appears the only purpose the city ever had in repudiating the contract was to provide a water supply by the alternative of the two modes, by which a city in Georgia may exercise the power of taxation for the purpose of providing water for fire protection and the domestic use of its inhabitants, namely, by municipal ownership of the works necessary for the purpose, instead of adhering to the contract with private parties, the method first adopted.

It appears that at the same time the city repudiated the contract it procured certain tax-payers to bring a bill for injunction against it, and the bond election was held back to abide the result of that suit. The case having gone to the supreme court of the State and been there argued, the election was called for a date which would allow time for a decision to be rendered in the usual course of things before the election. The decision not having been promptly rendered, the election was postponed and not held till after the court announced its decision.

It is shown by letters from the city to the water company and by the testimony of the mayor and aldermen, and nowhere denied, that it has from the very beginning been the city's purpose to substitute a system of water supply under municipal ownership, under section 377 of the Georgia Code, for the plan originally adopted of obtaining such supply by contract under Code sections 2407 *et seq.*, and that this has been the prime moving, controlling purpose which has shaped the city's course throughout.

We think, therefore, that, while the ordinances for issuing bonds and building or buying water works were subsequent in the order of time to the repudiation and refusal to pay, the former were not subordinate to or in aid of the repudiation and refusal to pay, but the repudiation and refusal to pay were subordinate to and in aid of the city's purpose of issuing bonds and owning its own water works.

Nor do we think the accompanying or precedent refusal to pay changes in any way the essential character of the city's ordinances, acts, and threatened action, in establishing water works of its own, in impairment, as we insist, of the city's contract obligation not to do so.

The purpose of owning its water works and supplying the water which the company was to supply is just as real, just as efficient, just as destructive of the rights and property of the other contracting party, whether such purpose be formed

earlier or later, whether it exists singly or in conjunction with some other purpose.

In either event the result reached is precisely the same.

The city's acts in ordaining to build or acquire and operate water works of its own, for the purpose of fire protection and of providing its inhabitants with their water for domestic use, impaired the right which by the prior ordinance constituting the contract the water company had of furnishing this fire protection and this water for domestic use, and diminishes the city's duty to accept and pay for the water for fire protection, and afford to the other party the unrestricted opportunity of furnishing the inhabitants with water for domestic use, to the great and manifest injury of the other party.

IV.

This court, in holding that the acts of the city do not make a case arising under the Constitution of the United States, makes no note of the fact averred in the bill (Rec., pp. 11, 12) and established by the proof that the city having by the contract obligated itself to pay for water furnished for certain specified municipal purposes by remitting city taxes, and the water company having complied with its part of the agreement, and furnished water averred to be reasonably worth the amount of the taxes that would have been otherwise exigible, and the city having accepted the water so furnished as full payment of all taxes, exactly as though the taxes had been paid to the city by the company and the like amount paid back into the hands of the company in payment for the water, yet the city thereafter, at the time of the other acts complained of and as part of its ordinance repudiating the contract, exacted, assessed, levied, and collected taxes for each of the years the contract had been in existence (1891–1894, inclusive), retaining the amount of the taxes

for those years out of the hydrant rental for the year 1894, paying the company the $2,000 less the amount of the taxes, and had assessed and was proceeding to levy and collect the tax for the year 1895 when restrained by injunction.

We think this constituted legislation in impairment of the obligation of the contract within the meaning of the constitution.

As held by this court in *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U. S., 19, 31, *supra*, "the power of determining what persons and property shall be taxed belongs exclusively to the legislative branch of the government, and, whether exercised by the legislature itself or delegated by it to a municipal corporation, is strictly a legislative power, (citing) *United States v. New Orleans*, 98 U. S., 381, 392; Meriwether *v.* Garrett, 102 U. S., 474."

As to the validity of such a provision in the contract, the rule laid down by the supreme court of the State is as follows:

> "While a city cannot exempt a gas company from municipal taxation, it can contract to pay for gas a stipulated sum per lamp, and in addition thereto, a sum for all the lamps supplied equivalent to the amount of taxes imposed upon the company, provided this additional sum is a fair and just allowance to compensate for the actual value of the light service, and the stipulation is *bona fide*, and not in the nature of an evasion of the law prohibiting exemption from taxes."
>
> 89 Ga., 683, *The Cartersville Imp. Gas and Water Co. v. The Mayor and Aldermen of Cartersville.*

The final decree of the circuit court in the case at bar upheld the provision to the extent of ordering an accounting to ascertain the value of the water furnished under this clause of the contract, and directed that the value of the water so supplied be allowed as a credit against the amount assessed as taxes, and until such accounting should be had and the amount credited on the tax bills the injunction is continued of force (Record, pp. 168, 169).

We think that the city's action in levying and seeking to collect the taxes, contrary to the above provision of the contract, was the exercise of a strictly legislative authority in its character, and was an impairment of the obligation of the contract within the meaning of the impairment of the contract clause of the Constitution of the United States.

V.

We ask that the court review and consider its ruling that the bill failed to present a case under the Constitution of the United States, and that the bill should be dismissed for want of jurisdiction.

We believe the reasons above set forth will make it apparent to the court that the ordinances and acts of the city complained of in the bill are properly to be regarded as legislative in their character and are such as to have the effect of impairing the obligation of the contract.

As this court well says, the decisions on the two sides of the lines are very near to each other.

Unfortunately counsel for the appellee, embarrassed by the large number of propositions presented in the very numerous and diverse assignments of error, failed to direct their attention to a point not explicitly raised in the demurrer or answer or argued in the court below, and this court therefore was not directed to Georgia statutes and decisions, which, we think, very clearly bring the case within the principle laid down in the Walla Walla and Vicksburg cases and serve as clearly to distinguish it from *St. Paul Gaslight Co. v. St. Paul.*

We earnestly ask a rehearing in view of the importance of this case to these bondholders.

We ask the rehearing the more confidently because there are few more important or difficult questions, or which call for more earnest and careful consideration, than the question of what action on the part of a municipality constitutes legis-

lation within the meaning of the contract clause of the Constitution.

Competent foreign critics have observed that our cities constitute the danger point in American politics.

It is at that point the rights and liberties of the citizen are most seriously threatened, and it is there the safeguards afforded by the Constitution must be firmly upheld if that great instrument is to survive in all its pristine vigor.

There is no more wholesome feature in the American system of self-government than that which makes honesty and fidelity to obligations the corner-stone upon which the structure is builded.

As was well said by Mr. Chief Justice Marshall, "The convention appears to have intended to establish a great principle, that contracts should be inviolable."

We think that under a sound rule of interpretation, such a definition should not be adopted as would make the jurisdiction of the courts narrower than the right to be protected; narrower than would uphold the duty of the city, acting under powers delegated to it by the State, to respect and keep inviolate its contract obligations.

JOHN G. JOHNSON,
JOHN I. HALL,
OLIN J. WIMBERLY,
Attorneys and Counsel for Appellee.

CERTIFICATE.

The undersigned counsel for appellee hereby certify that in their opinion the grounds stated in the foregoing petition and in the accompanying brief are valid grounds in law for a rehearing of this case.

JOHN G. JOHNSON,
JOHN I. HALL,
OLIN J. WIMBERLY,
Counsel for Appellee.

BRIEF IN SUPPORT OF ABOVE PETITION.

I.

We think the court, in holding that the case at bar is governed by St. Paul Gaslight Co. *v.* St. Paul, 181 U. S., 142, and not by Walla Walla *v.* Walla Walla Water Co., 172 U. S., 1, did not have its attention brought to the extent of the power given by the legislature to the city of Dawson in respect to erecting its own water works or contracting for water.

The power, though conferred by legislation more general in its terms, yet as that legislation is construed and interpreted by the courts of the State, is as ample and broad as that given the city of Walla Walla by the act of the Territory of Washington incorporating that city. The power being the same, the city in either instance did exactly the same thing, namely, exercised the power in one of the two ways and later sought to execute it in the other—that is to say, in each case the city had the power to provide water for its inhabitants for fire protection and for domestic use, and could do this either by contract with a private party, individual, or corporation or by holding an election, issuing bonds, and erecting water works of its own. In each instance the city resorted first to the first of these methods and later, after the other contracting party had incurred large expense in putting itself in a position to carry out the contract, the city proceeded to adopt the second method, called an election, procured a vote favorable to the issue of the bonds, and was about to issue the bonds and build water works of its own when restrained by injunction.

Thus the two cases are in all substantial particulars identical. There is the minor difference that in the Walla Walla case the city claimed that the water company had failed to

carry out its contract, whereas in the case at bar there was neither complaint nor ground of complaint at the time the city elected to substitute water works under municipal ownership for water supply under contract with a water company.

In each case the city set up that the contract was void through want of power of the city to make it; and if in the Walla Walla case the city recognized the justice of paying for the water as long as it continued to use it, and in the case at bar the City of Dawson saw nothing wrong in continuing to use the water and enjoy fire protection after it ceased to pay for it, there is no less equity in the bill by reason of that fact.

In both cases the legislative authority under which the city acted was found in its charter (reinforced in the case at bar by the statute providing for the holding of bond elections), and there was no subsequent act of the legislature, or other legislature subsequent to the contract, except that which is found in the city's own acts.

In both cases the legislation alleged by the bill to be in impairment of the obligation of the contract consisted of an ordinance calling an election upon the question of issuing bonds to build water works, the holding of the election, the obtaining a vote carrying the proposition, and the city's admitted purpose of carrying into effect the authority so given.

In the Walla Walla case the city contracted not to erect water works of its own. As pointed out in the former brief, such is in substance and effect the contract of the city in the case at bar.

The cases, it will be seen, are therefore all fours with each other.

In *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S., 65, the city of Vicksburg, by an act of the legislature of the State of Mississippi approved March 18, 1886, was authorized "to provide for the erection and maintenance of a system of water works to supply said city with water, and to that end

to contract with a party or parties who shall build and operate water works." A contract was entered into, and the Vicksburg Waterworks Company succeeded to the rights of the original contracting party.

On March 9, 1900, the legislature passed an act authorizing the city to issue bonds, and purchase a system of water works to supply itself with water. The city held an election, at which it was voted the city should issue bonds to buy or construct water works for said city. The city passed a resolution or ordinance as follows:

"*Resolved*, That the mayor be and is hereby instructed to notify the Vicksburg Waterworks Company that the mayor and aldermen deny any liability upon any contract for the use of the water-works hydrants; that from and after August, 1900, they will pay reasonable compensation for the use of said hydrants; that the city attorney take such action as shall be necessary to determine the rights of the city in the premises."

This last-mentioned ordinance was in all substantial respects identical with the ordinance by which the city of Dawson repudiated its contract in the case at bar.

The city in each instance at the time of repudiating the contract decided upon a suit to determine the validity of the contract, with this difference: that, in the case of the city of Dawson, the city instructed its city attorney (not by resolution openly and in the light of day, but privately) to bring a suit against itself in the name of tax-payers friendly to its purpose, asking an injunction to restrain it from doing what it had by ordinance resolved not to do.

In the case at bar and in the Walla Walla case the legislative authority under which the city called an election upon the question of issuing bonds to build water works was by act antedating the contract. In the Vicksburg case the act of the legislature authorizing the election and, upon favorable vote, the issuing of bonds to build or buy water works was passed subsequently to the making of the contract.

This, as we conceive, can make no difference. The law looks at substance, at results reached, at that which is accomplished. The act of the legislature of Mississippi of March 9, 1900, it seems, did not require the city to issue the bonds or build or buy water works, nor, it seems, make it compulsory to submit the question to popular vote. It seems to have been permissive merely, and it was the city's ordinance which was the efficient agency in impairing the obligation of the contract.

And such was the ruling of this court in that case. The court say:

"As respects the act of March 9, 1900, it is contended by the complainant that it is unconstitutional for several reasons, chiefly, because it places an arbitrary valuation on the property of the complainant, and because it purports to authorize the city to build and operate water works of its own in derogation of the contract rights of the complainant.

"Whether this act of the legislature of Mississippi is, in its terms, subject to those objections, or whether it may be regarded as merely authorizing the city to proceed in such a manner as not to conflict with existing contract obligations, we need not determine at this stage of the case, because we think that the ordinance of the city of November 7, 1900, whereby the mayor was instructed to notify the water works company that the mayor and aldermen deny any liability upon any contract for the use of the water-works hydrants, and the subsequent action of the city in holding an election to authorize the issue of bonds to buy or construct water works of its own, and in refusing to pay the amount due and payable under the terms of the ordinance, do not present the mere case of a breach of a private contract to be remedied by an action at law, but disclose an intention and attempt, by subsequent legislation of the city, to deprive the complainant of its rights under an existing contract."

Vicksburg Waterworks Co. v. Vicksburg, 185 U. S., 65, pp. 81, 82 of opinion.

The acts of the city of Vicksburg in that case, which the court declares to disclose "an intention and attempt by sub-

sequent legislation of the city to deprive the complainant of its rights under an existiug contract," and which the court holds to present a case "within the meaning of the Constitution of the United States and within the jurisdiction of the circuit court as presenting a Federal question," are precisely the things which were done by the city of Dawson and which in the present bill are averred to be within the meaning of the Constitution of the United States and within the jurisdiction of the Federal court.

The matters to which we have above called the attention of the court we think will make it perfectly plain that the case at bar is not governed by *St. Paul Gaslight Co. v. St. Paul*, 181 U. S., 142, and it is perhaps unnecessary to say anything further with reference to that case. Inasmuch, however, as the general importance of the question presented would seem to merit a somewhat full and careful presentation, we will discuss the case even at the risk of unduly taxing the time of the court.

The case came to this court on a writ of error to the supreme court of Minnesota.

The case brought in the State court, and which afterwards went to the supreme court of the State (from whose decision writ of error was sued out to this court), was an action to recover the interest on the cost of construction of certain lamps mentioned in the ordinance below quoted. The complaint referred to the entire ordinance, in order to make a Federal question, but it seems no relief was sought but the recovery of money on a contract to pay money; and the statement of the cause of action would have been complete had all reference to the ordinance been omitted. If the refusal of the city to pay money did not constitute impairment, then there was no impairment so far as it could affect any relief prayer for or that could be granted in that case.

The charter of the St. Paul Gas Light Company empowered it to construct a plant to supply the city of St. Paul and its inhabitants with illuminating gas.

"The charter did not purpose to engage permanently with the company for lighting the city, but provided for agreements to be entered into on that subject with the city for successive periods, and from the beginning of the charter the parties did so stipulate for a specified time, a new contract supervening upon the termination of an expired one."

Under the provision of the charter the company was required, when directed by the city, to lay pipes and construct street lamps, provided the company should be satisfied the expenses would be justified by the income, and the city was required to pay therefor an interest of 8 per centum per annum on the amount of the sum of the original cost of said street lamps and lamp posts and the cost of laying and erecting the same.

After a considerable number of street lamps had been constructed, the company, by direction of the city, substituted electricity for gas in certain portions of the city (it being fairly deducible that the company's charter permitted), and hence the street lamps in those portions of the city which were lighted by electricity were no longer used.

"The gas company asserted its right to recover from the city the interest on the cost of placing in position the lamps, the use of which had been discontinued under the circumstances just above stated. The city denied its obligation to pay interest on account of the cost of these lamps."

The city passed an ordinance as follows:

"*Resolved*, That the St. Paul Gas Light Company be and it is hereby required forthwith to remove the gas street lamp posts in that portion of the city now lighted by electric light under contract with said company, and which said lamps have been discontinued by order of the board of public works.

"*Resolved, further*, That the board of public works is hereby required to transmit to the city comptroller a statement showing the number and location of said gas street lamp posts, not now in service in said electric light district above referred to, and that from and after the passage of

this resolution no interest be paid by the city of St. Paul to said St. Paul Gas Light Company on account of the cost of the purchase and equipment of said gas street lamp posts."

It was this ordinance which the gas light company claimed impaired the obligation of its contract.

It will be observed that there was no denial by the city of the validity of the contract—only a disagreement as to its proper interpretation.

It was not alleged that the removal of the lamp posts worked an injury to the gas company. On the contrary, the city's obligation to pay interest on the cost of the lamp posts, if such obligation existed, remained unaffected by the removal of the posts. The complaint alleged expressly that the obligation of the city to pay such interest on the cost of the lamps continued, although they were no longer in use for lighting purposes. No injunction was asked to restrain the city from removing the lamps, and it does not appear, so far as we can see from the report of the case, that the gas company objected to their removal.

The supreme court of Minnesota having interpreted the charter provision as not requiring the city to pay the gas company interest on the cost of the lamps after the city had ceased to use the gas and had contracted with the same company for electric lights for that portion of the city, the case was brought to this court on the ground that the ordinance impaired the obligation of a contract.

This court, in its consideration of the question, first states the two provisions of the ordinance which, it was claimed, had that effect, as follows, namely:

"It will be seen that only two subjects are therein referred to:

"(1.) The first, a command by the city to the gas company to 'forthwith remove the gas street lamp posts in that portion of the city now lighted by electric light under contract with the said company, which said lamps have been discontinued by order of the board of public works.'

"(2.) And, second, a declaration on the part of the municipal council of St. Paul of its intention not thereafter to pay the gas company interest on the cost of construction of the lamps so directed to be removed."

These two subjects or provisions the court proceeds to consider separately.

As to the first of these the court says:

"Now, it is apparent that the command given by the city to the gas company to remove the unused gas lamp posts from the streets in no way even tended to impair the obligation, if any, resting on the city to pay interest on the cost of the construction of the lamp posts which were ordered to be removed, since, in any event, if the contract imposed the obligation to make such payment, the duty of the city to do so was left absolutely unaffected by the order to remove. That is to say, if the duty to pay was created by the contract, such obligation to pay remained wholly untouched by the order of removal. This being true, it results that the order to remove the unused lamp posts cannot be treated as an impairment of the obligations of the contract without saying that such obligations were destroyed, although they were absolutely unaffected by the act which it is asserted brought about the impairment."

It will thus be seen that what the court holds as to this part of the ordinance is *not that it was not legislation*, but that it did not affect the obligation of the contract to pay.

And it is to be borne in mind, further, that the decision of the State court before this court for review, with respect to which it was claimed the obligation of the contract, was a decision solely upon the question of the city's obligation to pay interest on the cost of the lamps and not any other obligation which might have existed under the same contract. It was that question only that this court was undertaking to deal with. Its jurisdiction was invoked only with respect to the subject-matter of the suit and the subject-matter of the decision of the State court; and with respect to the obligation of the city to pay the interest on the cost of the lamps

this court says that the ordinance directing the lamp posts to be removed could not possibly affect that obligation, if the obligation existed.

That portion of the ordinance being thus disposed of, the court proceeds to take up and deal with the remaining portion of the ordinance, namely, the city's resolution that it would not pay interest on the cost of the aforesaid street lamp posts.

The question, therefore, reduced itself simply to this: Does a resolution of a city denying that it owes money, which the other party claims under a contract, as to the true meaning of which they disagree, constitute a law impairing the obligation of a contract?

As to this the court say:

"It was but a denial by the city of its obligation to pay, and a notice of its purpose to challenge in the future the existence of the duty to make such payment. This denial, whilst embodied in an ordinance, was no more efficacious than if it had been expressed in any other form, such as by way of answer filed on behalf of the city in a suit brought by the company against the city to enforce what it conceived to be its rights under the contract. When the substantial scope of this provision of the ordinance is thus clearly understood, it is seen that the contention here advanced of impairment of the obligations of the contract arising from this provision of the ordinance reduces itself at once to the proposition that wherever it is asserted on the one hand that a municipality is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises in violation of the Constitution of the United States. But this amounts only to the contention that every case involving a controversy concerning a municipal contract is one of Federal cognizance, determinable ultimately in this court. Thus to reduce the proposition to its ultimate conception is to demonstrate its error."

The court does not hold that ordinances of a city substantially affecting some right of the other contracting party

under the contract, or rendering the contract less beneficial to him or his duties more onerous, are not laws impairing the obligation of the contract.

On the contrary, the court is careful to prevent any such inference being drawn from the decision.

The court declares:

"It is no longer open to question that a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the State, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of the article of the Constitution of the United States."

Among the cases cited by the court upon this proposition is the Walla Walla case.

The court, in distinguishing the Walla Walla case from the case then before the court, thus states the ruling in the former case:

"In Walla Walla *v.* Walla Walla Water Company, 172 U. S., 1, the decision of the State court gave effect to a municipal ordinance which provided for the construction by the city of a new water-works plant which was to become a competitor with the contracting company."

The reference to the State court was an inadvertent error, the Walla Walla case not being a case coming up to this court from the State court, but an appeal from a circuit court of the United States, in which the suit was brought.

But this minor inadvertence does not affect the correctness of the clear and terse statement of the ground upon which Federal jurisdiction was predicated, namely, that the municipal ordinance "provided for the construction by the city of a new water-works plant which was to become a competitor with the contracting company."

This is precisely what the City of Dawson did also.

And what the City of Walla Walla did and what the City

of Dawson did the St. Paul case recognizes as widely removed and fundamentally different from a mere empty denial by resolution that the city regards itself as liable under the construction it places upon certain language in a contract the meaning of which is in dispute.

The Vicksburg case in the portion of the opinion already quoted draws the same distinction.

A resolution declaring that the city denies that the contract makes it liable is no more efficacious, is no more injurious to the other party, than a denial by way of answer in a suit. No right is abridged, no antagonistic action is taken.

When, however, the city undertakes the construction or passes an ordinance looking to the construction by the city of a new water-works plant which is to become a competitor with the contracting company, in disregard of its contract obligation that it will not do so, substantial rights conferred by the contract are impaired and destroyed. The State's delegated powers of taxation, of appropriating and using public moneys, of regulating the use of its streets, of legislating for the health and welfare of its inhabitants, and for the protection of property from fire, are turned into an active engine of destruction of rights which the contract secures to the other party, and it is just because the city is armed with these powers, and particularly because of the advantage the city has in possessing the power of taxation, that the water company cannot hope to successfully compete with the city, and of the two opposing systems of water works, that owned by the water company is sure to go the wall.

In the *Walla Walla case* this court declared:

"We know of no case in which it has been held that an ordinance, alleged to impair a prior contract with a gas or water company, did not create a case under the Constitution and laws of the United States. Granting that in respect to the two classes of cases above mentioned, responsibilities of a somewhat different character are imposed upon a municipality in the execution of its contracts, our attention has not

been called to an authority where the application of the constitutional provision as to the impairment of contracts has been made to turn upon the question whether the contract was executed by the city in its sovereign or proprietary capacity, provided the right to make such contract was conferred by the charter."

And the court held that such an ordinance constituted legislation in impairment of the obligation of the contract.

The *St. Paul case*, so far from qualifying the principal rule thus laid down, restates it, citing the Walla Walla case in support of it, as is above shown.

We have been unable to find a case in which the court qualifies or calls in question the soundness of this principle.

II.

The court in the opinion refers to the Federal question raised by the amended bill as an attempt by an afterthought to give jurisdiction.

This criticism is no doubt fully justified by the original framework of the bill, looking at it objectively.

Looking at the matter, however, from the subjective standpoint of what was in the pleader's mind, we ask leave to point out that the court is under an impression not wholly accurate.

The Walla Walla case, in which jurisdiction is predicated upon the existence of the Federal question, had been decided and is commented upon by the supreme court of Georgia in the decision in the Dawson Waterworks case, which last decision is referred to somewhat fully in the bill.

The contract, the rights under it, the city's obligation, the ordinances are pleaded in the bill, and it is alleged that these ordinances and the city's acts under them are all pleaded, and it is alleged that these ordinances and acts destroy the contract, and the rights thereby created, and it is upon this that relief is prayed.

The bill does not explicitly refer to the contract clause of the Constitution, nor are the words used aptly chosen with reference to the words used in that instrument.

When the demurrer or answer to the rule pointed out these defects, the amendment was offered, and without objection was allowed.

Every fact which goes to make up a case such as gives jurisdiction under the Constitution is set up minutely, particularly, and accurately in the bill as originally framed, save only that the case is not explicitly in terms stated to be a case arising under the Constitution. It was, however, believed by plaintiff that the amendment of the bill already brought would have the same effect as if the first bill had been withdrawn and a new bill had been filed, or the bill as originally framed had contained the averments added by the amendment.

The jurisdiction was invoked in good faith, and, acting upon the belief and in full reliance that such jurisdiction existed, the complainant has caused to be expended large sums of money in erecting a costly standpipe and bettering the service and in conducting an expensive litigation; the town has throughout the six years that have elapsed since the bill was brought been supplied with water and furnished fire protection for which it has paid nothing. This the plaintiff has done in its efforts to preserve the rights which have arisen under this contract from impairment and destruction. The right to recover the rentals for the earlier years, unless this suit stands, is lost through the bar of the statute of limitations.

We think, therefore, this plaintiff is entitled to invoke the benefit of the sound and just rule that a Federal question, raised in good faith, gives the Federal courts jurisdiction irrespective of what may be the ultimate decision of the court upon the merits.

Under any other rule the state of a person suing in the courts of the United States would, in cases in anywise bal-

anced with doubt, be so exposed to dangers and the risk of incurring great loss and hardship as to deter litigants in a large proportion of cases from asking the aid of those courts. This we do not believe the framers of the Constitution intended.

We think this the sound rule where the decisions on two sides of the question are near each other and the litigant seeks to have the question determined in the courts which the Constitution says are the proper courts to determine it, and vests with jurisdiction for that purpose.

We think, however, and have endeavored to point out, that the plaintiff's right is full and clear; that the court not only has jurisdiction, but a case is presented which entitled the plaintiff to relief conformable to the prayers of the bill.

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